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"LE GOUVERNEMENT DES JUGES ET LA LUTTE CONTRE LA LÉGISLATION SOCIALE AUX ETATS-UNIS" (Government by Judges and the Struggle Against Social Legislation in The United States). By Edouard Lambert. Giard & Cie. Paris, 1921, p. 276.

"We are judges," said the first of M. Anatole France's upright judges, "and not legislators and philosophers." "We are men," replies the other. And doubtless the controversy is as old as the existence of courts—the controversy between those who, sitting on the dais, wish to invest themselves with a personality differing from that of everyday life, and those who decline to do so. Professor Lambert's book is a polemic against the judges of the latter class, who attempt, he tells us, to usurp the functions of legislators and social philosophers, and takes as his text, or better as an *exemplum in terrorem*, a jurisdiction in which they had successfully done so, the United States.

His study of the question leaves nothing to be desired for thoroughness and completeness. He has examined all the relevant material, and has read an incredible number of books and articles. That is the more remarkable because, as he himself points out, American law books and periodicals are excessively rare in France. Indeed, in part, his book is a vigorous plea that this state of things be amended and that law libraries and universities in France provide themselves with at least some of the more important sets of reports, if they wish to gain even a partial comprehension of our law.

M. Lambert relies principally on Thayer, on Powell, on Freund, for his analysis of the development of the American theory of judicial supremacy. In his earlier chapters he has drawn heavily on Judge Hough's articles in the Harvard Law Review. He could find no better guides. It would have been unfortunate if a distinguished foreign jurist derived his conception of our constitutional system from those many—alas, how many!—formal essays and addresses in which it is shown with due solemnity that such decisions as *Lochner v. New York*—not to mention *Truax v. Corrigan*—were almost in set terms authorized in the Federal Constitution and explicitly provided for in *Marbury v. Madison*.

M. Lambert then proceeds to examine the further illustrations of judicial control, such as the proposed rejection even of Constitutional Amendments and the "construction" of statutes. He finds the popular agitation expressed in the recall and prohibitive legislation quite ineffective, and the palliatives of the American system, the advisory opinions, the declaratory judgments, and the growth of administrative tribunals, seem to him too limited in scope seriously to imperil the enormous and formidable power of the courts.

This, then, is the American "experience" to which he directs the attention of his countrymen—a legislature completely enveloped by innumerable judicial tentacles which tighten frequently and prevent movement in any direction but one; and with no prospect of the severance of any of these tentacles or the paralysis of the hydra body from which they spring. I have purposely used a terrifying figure of speech because it is plain that the condition appears in

this way to M. Lambert. He earnestly desires that French courts do not travel on the path along which America has gone so far, but that they confine themselves to their proper task of applying and interpreting the law.

He points out that if the French courts should ever wish to pass on the constitutionality of the statutes, the means of doing so is ready to their hands. They have but to consider the Declaration of Rights of 1790-1791 as underlying all French constitutions, to have in their possession an instrumentality quite as efficacious as the Due Process clause of the Fourteenth Amendment. And he is not considering a purely academic problem. This use of the Declaration was specifically proposed by MM. Benoist and Roche and had the powerful support of no less personages than Jèze, Saleilles and Hauriou. Other countries with systems modelled on the French Code have already witnessed the exercise of such a power by the courts. If, therefore, M. Lambert and those for whom he speaks show earnestness and agitation on this question, it is because it is a real and living one.

There is one notable thing about it. The upright judge of Anatole France who wishes to emancipate himself from the task of merely interpreting existing law, does so in the interest of just those liberal and progressive men for whom M. Lambert speaks; and yet these same elements, as represented by him, are apparently bitterly opposed to this emancipation or to any assumption of legislative functions by judicial officers. The moral of this contradiction is obvious enough. When "Les Juges Intègres" was written, French radicals constituted a minority and legislatures were not disposed to do more than enforce the existing economic organization. A rare judge such as Magnaud, who disregarded existing law in order to further what he believed to be the interests of the masses, was the object of enthusiastic admiration by Socialists and bitter denunciation by conservatives. But legislatures and ministries have arisen since composed of men from the extreme Left. It is true that no really subversive laws have been passed, but limitations of the right of contract and of property have been freely established and it became evident that this process might go much further. Consequently it is on the conservative side that the demand arises for a control of the legislatures by the courts "in the American manner." This is expressly done by writers in such conservative organs as the *Moniteur de France* and if M. Antonelli in the radical *Journal de Lyon* has much to say in derogation of those who use the courts to advance one economic theory, he is merely changing places with the conservative *Journal des Débats*, which was similarly exercised when Magnaud used the tribunal of Château-Thierry to advance the opposite economic theory.

To this it might be replied that cases like Magnaud are *phénomènes*, rarities, while the bent of the judicial minds in general is much more toward maintaining the economic status quo. If this is true, it is in all likelihood due to nothing more mysterious than the fact that lawyers unconsciously and consciously adopt the inter-

ests of their clients. The clients of a successful lawyer in precise proportion to his success, are the very men who are the most concerned in maintaining an economic structure from which they profit so much. Judges again are either themselves eminent, that is successful, lawyers, or are trained in the same schools and live in intimate association with them. So that the court is likely to be recruited from elements to whom M. Lambert would not wish to grant so important a power as the constitutional supervision of the legislature.

Now M. Lambert weakens his case by insisting that even in the interest of capitalism (the word is unavoidable) the protection of individual rights by the courts is ineffective. All the American courts succeeded in doing was to stave off the day of workmen's compensation bills and the like. They could not permanently prevent them. If he is right, he has proved, it seems to me, that a popular determination to effect economic reforms will not readily be hindered even by a judicial control much more rigorous than that of the French courts is likely to be. But, really, he need not have admitted so much. One can prevent reforms almost as effectively by postponement as by rejection. Mr. Dicey has shown us—what we might have found out for ourselves—that if law persists in following opinion only at a safe distance, it will, of course, never overtake it. And if a law is finally passed when popular interest is engrossed in other matters, it has little of the effect hoped for by its proponents. Accordingly, if the American system has compelled workmen's compensation to wait a generation, it has put its operation into the hands of men very different from those who originally and passionately desired it, and who might have made of it the beginning of a series of new enactments. That will be the merit of our system to our moderate Tories, just as it is its vice in the eyes of our pale pink radicals. But it shows a real limitation on the power of the courts. In the eighteen nineties—Blue Sky Laws, Rent Regulation, and doubtless Workmen's Compensation would have been roughly cast out by the courts as obviously subversive of guaranteed rights of property. In the nineteen thirties, courts may approve of the expropriation of mines, railroads and large industrial plants.

That M. Lambert's fears are idle, no one can assert, but it is hard to believe that the danger is imminent in France. A system which, like the American, postulates a legislature of limited powers has set the logical basis for a mechanism to enforce the limitation. But the general provisions of the Declaration of the Rights of Man could be used to intimidate only a legislature which is consciously making economic experiments that are not yet generally accepted. Whether caution or adventurousness is the better quality will be answered by men in accordance with their temperaments. The *Mercure de France* urges caution—so little are names ominous! M. Lambert is readier to take chances. And his constitutional views are shaped by that fact.

He makes a sharp distinction between what he calls American "construction" of statutes and French interpretation. What he means after all is no more than this: American courts, he thinks, are bolder in their dealing with statutory expression. That is doubtless so and altogether natural. We may without flattery pay our French contemporaries the compliment of saying that they draft their laws better than we do. Henri Beyle regarded the Code Civil as the perfection of literary style, and in practice and precept treated it as a model for all who wished to write. I can think of no American statute of which a man might say that without imperiling his reputation for sanity. But even these better framed statutes—worded with more skill, considered with more care than are our own—have been subjected to an interpretation that surely often makes them say something very different from what the framers meant. Some of the boldest of Magnaud's "interpretations," we are told by M. Geny, "do not exceed the average boldness of French judicial decisions." We may find an excellent example in the manner in which French courts have evaded the famous provision, *La recherche de la paternité est interdite*, by applying the general tort section, Code Civil 1382. Here the court, by conscious effort, disregarded in part a deliberately expressed statutory prohibition. American courts have done as much, but not very much more.

If therefore construction of statutes "in the American manner" is an effective substitute for the power of constitutional supervision, French courts need make no effort to acquire it. They already have it. And they will use it in accordance with the training or character of the judge—a situation not notably different from our own.

So far we have considered M. Lambert's book as a vigorous and able pamphlet against the danger he foresees. It has other merits. It is an admirable collection of material on the whole question of constitutionality. I should be hard put to it to name a better resumé of recent literature on the subject in English. The material has, to be sure, not been critically sifted. Articles of first-rate importance are not distinguished from mediocre ones; but judgments on such questions differ and M. Lambert is after all not primarily engaged in the work of scholarly research.

It is a little amusing to note with what ingenuity he or his proofreader misspells American names and misprints the titles of American books. Of course no harm is done. We have no difficulty in recognizing "Massachuset's" and even "Mumm v. Illinois."

And doubtless American citation of French books has as weird an appearance to Frenchmen. One thing may be commented upon, and on this, adapting Lord Stowell's words, I should like to speak as diffidently as it becomes me to do—and that is very diffidently indeed. M. Lambert's style seems labored and difficult, and not quite in the fine French tradition of limpidity and gracefulness. That is unfortunate, because bad writing is one of the special vices of our law, and it is to French models that we have been enjoined to turn, and of French books that one would ordinarily use the words—*nocturna versate manu, versate diurna*.

Max Radin.

THE PROBLEM OF PROOF. By Albert S. Osborn. Matthew Bender & Company, Incorporated, Albany, New York, 1922, pp. xxi, 526.

This is a book by the distinguished author of "Questioned Documents," written from the point of view of the experienced expert witness. It contains many valuable suggestions for the lawyer in preparing his case. The author discusses the use of photographs to show the facts and the preparation of photographs in sets so that each jurymen may have a set with him as the expert makes his points. The importance of modern science in preparing the facts is emphasized: "The usual method followed makes it necessary to say that in studying the facts it is not sufficient to read only ancient legal opinions. In science, age does not add force to any statement, and every alleged authority is tested by the latest researches. It is a well established principle in the scientific world that any scientific work twenty-five years old, for that reason alone, may not be an authority, and when the law investigates or discusses scientific subjects accuracy demands that the rules of science be followed. A scientific investigation of anything relating to physical facts is not properly completed by simply looking into some old law book and seeing what was said in some old opinion, written perhaps by an unscientific writer many years ago." (p. 12.)

The problem in alleged forgeries is to determine how much and to what extent genuine writing will diverge from a certain type and to what extent will a forgery be likely to succeed and be likely to fail in embodying the essential characteristics of a genuine writing. In the proof of these matters and in the exposure of incompetent and crooked handwriting experts full specimens of examination and cross examination are given. The inability of many to recognize